Court of Appeals Cause No. 48190-1-II

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

ROGER DALE ST.GEORGE,

Appellant,

vs.

JEANNE ELLEN ST.GEORGE,

Respondent.

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

ROGER and JEANNE ST.GEORGE were married on August 12, 1972, when she was 19 years of age. JEANNE attended college for one year before marrying ROGER, who was more than two years older and just finishing his Bachelor's degree. During the 42 year marriage JEANNE had various odd jobs, but was primarily a homemaker and stay-at-home mom for their two, now adult, children. She acquired no work skills or experience during the marriage which could make her employable at age 62. Roger in contrast earned an MBA in Business Administration during the marriage and accumulated retirement benefits. (RP 41)

After operating a 7-Eleven store in Idaho (RP 8), ROGER and JEANNE relocated to Grays Harbor County, Washington, where they over time purchased three 7-Eleven stores which ROGER ran while JEANNE did some bookkeeping for which she was paid $150 per week. (RP 34) The three stores were later incorporated into St. George Stores in which ROGER and JEANNE each owned 50% of the stock. (RP 97, 98)

The couple purchased a home in Hoquiam, Washington, and over the years accumulated personal property. Medical insurance for each was provided through the corporation.

One week after celebrating their 42nd anniversary, ROGER commenced a dissolution of the marriage. JEANNE, who earlier had been told by ROGER to deposit into her inheritance into their joint account and not invest in the stock market (CP 9-13 Declaration of Respondent, pg 2, lines 11-17), immediately withdrew those inherited funds and deposited them into another account in her name only. Later, she received additional monies after her parents' real estate in Colorado was sold following her father's death. She shared these funds with her two brothers. (RP 81)

In his Petition for Dissolution of Marriage, ROGER admitted that maintenance should be ordered for JEANNE. (CP 1-4) This was reflected in a Temporary Order entered on September 20, 2014. (CP 16) In that Order, ROGER agreed to pay the mortgage, insurance on JEANNE's automobile, her cell phone, and the balance due on the CitiCard credit card in the amount of $13,000. He also was ordered to pay $1,350 monthly maintenance to JEANNE, which was less than JEANNE had requested. (CP 16)

The trial was held on January 16, 2015. Both sides submitted pretrial memoranda which recommended property distributions. The primary issues at trial were the value of the business, the disposition of the family home, maintenance, and separate property. Both parties agreed that the business should be awarded to ROGER. JEANNE was ordered to

remain away from the business. At that point she had no income other than the maintenance of $1,350 per month.

ARGUMENT

One of the more basic and most important rules governing appellate procedure is found at RAP 10.3(g):

> "(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."

That court rule has been cited many times. Typical of the cases interpreting RAP 10.3(g), is *Marriage of Knight*, 75. Wn.App. 721, 800 P.2d 71 (1994), at 732:

> "Jeffrey Knight fails to assign error to the trial court's findings. Thus, we treat them as verities on appeal. [Citation omitted.]

A more recent case in which a trial court's findings of fact were not challenged on appeal is *Seven Sales, LLC vs. Otterbein*, 199 Wn.App. 204 (2015), ____ P.3d ____.

> "Seven Sales does not challenge the trial court's findings of fact, therefore they are verities on appeal. [Citations omitted]. We

review *de novo* whether the trial court's findings of fact support its conclusions of law. [Citations omitted].

ASSIGNMENTS OF ERROR NOS. 1 & 2

In this case the Appellant has failed to assign error to the trial court's Findings of Fact and therefore they are "verities on appeal". There remains the issue of whether the Conclusions of Law are supported by the Findings.

In his first two Assignments of Error, the Appellant argues that the trial court improperly concluded that the Respondent's inheritance was separate property even though at one time it was deposited into a joint account, but immediately withdrawn when the Appellant commenced the dissolution.

Appellant did not assign error to Findings of Fact 2.9. It is therefore a verity on appeal. Moreover, the testimony and exhibits support the Finding. In her first Declaration, the Respondent stated that the Appellant advised her to deposit her inheritance into the joint account and avoid the stock market. (CP 9-13) Secondly, the trial court correctly pointed out that the Appellant's name never appeared on a deed or in any of the inherited bank accounts. Further, no community funds were expended in support of the Respondent's separate property. (RP 215)

ASSIGNMENT OF ERROR NO. 3

In his Assignment of Error No. 3, the Appellant argues that the trial court improperly valued the business. No assignment of error was made of Finding 2.8.B. In Finding 2.8.B., the trial court set forth the basis of its finding. It was based upon the testimony of the Petitioner and the Respondent (RP 81-83, 103), and Exhibit 29—the email sent by Appellant to Respondent in his effort to convince her to avoid involving attorneys.

ASSIGNMENT OF ERROR NO. 4

The Appellant argues in his Assignment of Error No. 4 that the trial court erred in ordering maintenance. No error was assigned to Finding 2.12, and it is a verity on appeal. Further, a fair reading of Finding 2.12 and a review of the testimony provide substantial evidence in support of the finding. Because the Appellant in the original Temporary Restraining Order paid virtually all of Respondent's living expenses, the maintenance order was set low. (RP 320, 321) Such is not now the case and the Respondent's testimony supported the amount of maintenance ordered. The trial court is never required to follow even the recommendation of a party. Further, the trial court set a review and made the maintenance modifiable. (RP 111-115)

ASSIGNMENTS OF ERROR NOS. 5 & 6

The Appellant's Assignments of Error Nos. 5 and 6 appear to overlap. He apparently is complaining that he was required to follow the Temporary Restraining Order until the Decree was entered. At no point in is the trial court required to give credit by reducing the judgment to reflect payments made. The maintenance was originally set low to reflect the payments the Appellant agreed to make on household expenses. Now he wants to be reimbursed! (RP 320, 321)

ASSIGNMENT OF ERROR NO. 7

Finally, the Appellant complains that the trial court failed to comply with RCW 26.09.080. A reading of the transcript shows just how Judge McCauley struggled with this case and how he believed that, while not a "perfect 50:50" division, he believed that he had made a fair and equitable division of assets and liabilities. (CP 111-115)

Judge McCauley listened to the testimony; judged the credibility of the witnesses (value of rugs $750 to $2,000; RP 139); reviewed all of the documentary evidence; and made his decision.

At this point, it is proper to review the role of the appellate courts as discussed in *Bellevue v. Pine Forest Props.*, 185 Wn.App. 244, 340 P.3d 938 (2014), discussing *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011):

> "Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. *See, Smith [v. Skagit County],* 75 Wn.2d [715,] 719[, 453 P.2d 832 (1969)]. However, substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings. *See [In re Marriage of] Rideout*, 150 @n.2d [337,] 352[, 77 P.3d 1174 (2003)]; *Anderson v. City of Bessemer City,* 470 U.S. 564, 574-75, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985) (deference rationale not limited to credibility determinations but also grounded in fact-finding expertise and conservation of judicial resources).

RESPONDENT'S REQUEST FOR ATTORNEY FEES AND EXPENSES

The Respondent is unemployed and dependent upon the Appellant for maintenance. She respectfully requests that she be awarded attorney fees and expenses on appeal. If granted, an Affidavit of Financial Need will be filed.

CONCLUSION

The Appellant seeks to retry this case on appeal. The trial court spent many hours hearing testimony and considering exhibits. Any

reasonable judge would have decided this case in the same way as did Judge McCauley. His decision should be upheld.

The Court should award the Respondent reasonable costs and attorney fees for this appeal. This request is made pursuant to RAP 18.1.

DATED: August 19, 2016

Respectfully submitted,

BROWN LEWIS JANHUNEN & SPENCER
Attorneys for Respondent

By _____
CURTIS M. JANHUNEN, WSBA #4168

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ROGER DALE ST.GEORGE,

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and

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CERTIFICATE OF MAILING

I, Carlene E. Kuhn, hereby certify that I am a citizen of the State of Washington, over the age of 18 years, and competent to be a witness herein. That I deposited the original and one true and correct copy of Brief of Respondent, in the United States mails, postage prepaid, on this 19th day of August, 2016, addressed as follows:

David C. Ponzoha, Court Clerk
Court of Appeals, Division II
950 Broadway, Ste 300, MS TB-06
Tacoma WA 98402-4454

I further deposed in the United States mails, postage prepaid, on this 19th day of August, 2016, a true and correct copy of the Brief of Respondent upon the attorney for Appellant:

Benjamin Winkelman
Attorney at Law
P O Box 700
Hoquiam WA 98550

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of August, 2016, at Montesano, Washington.

CARLENE E. KUHN
Assistant to Curtis M. Janhunen
Attorney for Respondent